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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 516

MARCAL PULP & PAPER, INC.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner, Marcal Pulp & Paper, Inc., hereinafter called Marcal, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered August 11, 1959.

Opinion Below.

The Opinion of the Tax Court of the United States, filed September 30, 1938 and reported in 30 T. C. 1345, is printed at R. 6a-19a.[1] The opinion of the United States Court of Appeals for the Third Circuit, not yet officially reported, is printed in Appendix A hereto, *infra*, 1A.

[1] Record references are to the printed appendices filed by the parties below and submitted here pursuant to Rule 21(3) of this Court. The separately bound "Appendix", filed by petitioner in the Court of Appeals contains R. pages 1a through 45a. The pages of "Respondent's Appendix" below have been renumbered 46a and 47a.

Jurisdiction.

The judgment of the Court of Appeals was entered on August 11, 1959, *infra*, A-2. The jurisdiction of this Court is invoked under and conferred by 28 U. S. C., Section 1254.

Question Presented.

On March 22, 1952, Marcal was insured against two types of losses, (a) property damage and (2) use and occupancy. On that date, certain of its machinery was damaged. Marcal made a blanket claim for $250,000 damage but the insurer denied all liability. Marcal immediately placed an order with a manufacturer for new machinery to replace that which was damaged, the ultimate cost of such new machinery being approximately $120,000.00.

On August 6, 1952, Marcal reduced its blanket claim to $125,000 and the insurer paid said sum in full settlement of all claims. When this settlement was effected, Marcal had sustained no use and occupancy loss whatsoever, which fact the insurer then well knew. Simultaneously with the settlement, the insurer cancelled that part of the policy pertaining to the type of machinery that had been damaged. Of the $125,000 received from the insurer, Marcal used $120,000 to pay for the new machinery.

Never during the negotiations between the parties, or at the settlement, were there ever any allocations made, or even discussed, as between property damage and use and occupancy loss.

1. The sole question here presented is whether the allocation by the respondent for tax purposes of the $125,000.00 received by Marcal from the insurer, to wit, $25,000.00 property damage and $100,000.00 use and occupancy loss, was proper.

Statutes Involved.

The pertinent provisions of Sections 112 and 117 of the Internal Revenue Code of 1939, are printed in Appendix B-1, *infra*.

Statement of the Case.

Marcal is a corporation organized under the laws of the State of New Jersey. It is engaged in the manufacture of paper products, with its principal office at East Paterson, New Jersey.

On March 22, 1952, a unit of a paper manufacturing machine owned by Marcal was damaged. At that time there was in force a contract of insurance between Mutual Boiler & Machinery Insurance Co. of Boston, Massachusetts and Marcal. Said contract of insurance, originally issued on May 10, 1949, had been the subject of frequent revisions, so that as of March 22, 1952, the limit of liability thereunder was $150,000 per accident for property damage and $459,756 for use and occupancy insurance (R. 7a, 8a).

Marcal made a blanket claim against the insurance company, hereafter called Mutual, for $250,000 as a result of the damage of March 22, 1952. No allocation was made, when said claim was made or at any time thereafter in negotiation with Mutual or at the settlement of the claim, between property damage and use and occupancy loss. Mutual consistently denied any liability under its contract until August 6, 1952, when a settlement was consummated resulting in the payment to Marcal by Mutual in the amount of $125,000 in full satisfaction of the claim for $250,000 (R. 9a).

On July 25, 1952, while negotiations were in progress, Robert K. Rudge, controller of Marcal, transmitted to

Mutual a communication labeled as an "estimate" of certain purported use and occupancy loss resulting from the damage of March 22, 1952, but at the trial of this case in the Tax Court, Mr. Rudge readily admitted that there had been no reduction in production on the damaged machine and that such production actually increased thereafter in 1953 and 1954 (R. 3a, 4a, 9a).

Simultaneously with the settlement on August 6, 1952, Mutual cancelled that part of its insurance contract with Marcal which covered machinery of the type that was damaged on March 22, 1952 (R. 5a).

Upon receipt of the $125,000 from Mutual, Marcal duly made the election provided for in Section 112(f)(3)(A) of the Internal Revenue Code of 1939, in the manner prescribed by the Secretary's regulations. On July 8, 1954, Marcal applied to respondent for an extension of the period within which the damaged property might be replaced, to December 31, 1955. Respondent duly granted that application on August 10, 1954 (R. 10a, 11a).

Replacement of the damaged property was completed during September, 1955 at a total cost of $120,143.14 and thereafter and prior to December 31, 1955, Marcal duly filed with respondent its amended return for the fiscal year ended July 31, 1953, disclosing additional income of $4,652.49 by reason of the excess of the insurance proceeds over the cost of replacement of the damaged machinery (R. 10a, 11a).

While not actually installed until September of 1955, Marcal had placed an order therefor with the Messinger Bearing Company almost immediately after the accident of March 22, 1952, and long prior to the settlement of its claim against Mutual on August 6, 1952, as aforesaid (R. 10a):

In neither its original nor amended return filed for its fiscal year 1953 did Marcal disclose any part of the $125,000 item as taxable income except the amount of $4,652.49. The Tax Court held that of said $125,000, the amount of $100,000 was taxable as ordinary income since it constituted payment for use and occupancy loss. The Court of Appeals affirmed in a *Per Curiam* Opinion "on the thoughtful opinion of Judge Forrester, 30 T. C. 1345."

Reasons for Granting the Writ.

A.

(1)

The Decisions Below are in Direct Conflict with the Fundamental Principle that Courts may not Substitute Their Thinking and Judgment to Rewrite a Fully Executed Valid Contract in the Absence of any Claim by One or More of the Parties Thereto with Respect to the Legality, Fairness or Equities of Such Contract.

A court may not substitute its thinking and conclusions, predicated wholly upon conjecture having no foundation in fact, for the intent, reasoning and purposes of the parties to a written contract in the consummation of a complete and mutually satisfactory settlement of a dispute arising between them with respect to their rights under such contract. This principle is too well established and too elementary to require citation of authority.

The lower Courts have here flagrantly violated that principle. They first adopted an erroneous premise upon which to ground their thinking and thus arrived at a conclusion utterly lacking in validity because of its variance with undisputed and clearly established facts. Their premise was this:

> "Mutual's liability under the contract of insurance for use and occupancy losses was 'actual loss sustained', not 'actual loss sustained at the date the claim is settled' " (R. 16a).

It is undisputed that Marcal had sustained no use and occupancy loss at the time the settlement was effected. For and in consideration of the payment to it of $125,000, Marcal gave Mutual a full release and discharge of any and all liability under the contract of insurance. But the lower Courts rewrote that settlement agreement by adding, in effect, the words, "provided, however that if any future use and occupancy losses are sustained by virtue of the property damage of March 22, 1952, Mutual does hereby assume full liability therefor."

The lower Courts then proceed with their reasoning thusly:

> "Therefore Mutual's 'exposure' to increasing use and occupancy loss continues until the claim is settled and in estimating the amount of such loss it is necessary to consider prospective as well as actual or past losses" (R. 16a).

As previously stated, there were no "actual or past" losses. It will be recalled, too, that Mutual cancelled the portion of the insurance contract covering machinery of the type damaged, simultaneously with the settlement. With a full release and discharge of *all* claims from Marcal in its pocket, and having climbed "off the risk", through its cancellation, it is difficult to perceive how Mutual was confronted with a continuing "exposure" to liability for future use and occupancy losses.

As to Marcal, the lower Courts pointed out that there was the possibility of future losses, suggesting that:

> "Such losses would result from a shutting down of the paper machine to enable its engineers to remove the damaged old dryer roll and replace it with a new dryer roll . . ." (R. 16a).

The record does not disclose what, if any, use and occupancy loss occurred when the new machine was installed in September, 1955, but it may safely be assumed that the job was done by a crew of expert engineers in a matter of 6 to 8 working hours. The record affirmatively establishes, however, that the old machine functioned normally up to the time it was replaced and that actual production thereon increased during the years 1953 and 1954.

Viewed in the light of these facts, the estimate and conclusion of the lower Courts that of the total amount of the settlement, $125,000, the sum of $100,000 represented payment of Marcal's use and occupancy losses is shown to be nothing short of fantastic.

Noteworthy is the *basis* of the lower Courts' conclusions. We find:

> "We are satisfied that some allocation of the insurance proceeds if necessary . . . However, respondent's determination of $100,000 to 'use and occupancy' seems reasonable *in view of the cost and age of the old dryer roll*, and it was incumbent upon petitioner to present credible evidence of some more reasonable allocation. Petitioner has not done so and *for this reason* we are compelled to approve respondent's determination in this respect" (Italics ours) (R. 17a).

Marcal did not introduce evidence to prove "some more reasonable allocation", because Marcal has consistently denied that *any* allocation was proper.

The lower Courts violated the general principle here under discussion in yet another respect. In the original

"Declarations of Policy" embodied in the contract of insurance when first issued on May 10, 1949, appeared this paragraph:

> "2. The Company shall not be liable as respects property of the Insured under Coverage A for more than the actual cash value thereof at the time of the accident . . . actual cash value in all cases to be ascertained with proper deductions for depreciation" (R. 37a).

On February 27, 1952 the above-quoted provision of the policy was superseded by the following:

> "The Objects covered under this Schedule are located on premises of the Insured described hereunder . . . and the amount indicated respectively in the column headed 'Limit per Accident' for each location shall be the Limit per Accident as respects all Objects at the said location, *instead of the amount stated as the Limit per Accident in the Declarations of the policy*" (Italics ours) (R. 41a).

Under this amendment to the original policy, the maximum amount payable for one accident was $150,000. Marcal paid an increased premium for this revision (R. 43a).

That both Marcal and Mutual, in effecting their settlement of August 6, 1952, treated the amendment of February 27, 1952, as governing Mutual's liability in the accident of March 22, 1952 is crystal clear from the evidence in this case. Both parties then and there knew that Marcal had ordered a new dryer, the ultimate cost of which would be not less than $100,000. Both parties were fully aware of the fact that Marcal had not sustained a dollar's worth of use and occupancy insurance. From Marcal's point of view, therefore, full compensation for the cost of the new machine would be a good settlement. To assure itself of this benefit,

it could gamble on a future loss should the old machine break down, and so it reduced its claim to an amount ample to pay for the replacement. Mutual reasoned that Marcal had an enforceable claim on property damage to a maximum of $150,000. Mutual was at that time "on the risk" for use and occupancy losses up to nearly $500,000. A settlement for $125,000, coupled with cancellation eliminating future losses on either property damage or use and occupancy losses, was highly desirable. And so the settlement was made.

The lower Courts interpret the amendments to the policy of February 27, 1952 as unaffecting the original property damage maximum of "cash value, giving effect to depreciation." In this case, about $31,000. Applying this interpretation, they find that Mutual could not have legally paid Marcal more than $25,000 in settlement of the latter's machine damage. But they do not attempt to explain how Mutual could legally have paid Marcal the sum of $100,000 in settlement of non-existent use and occupancy losses.

Whether the interpretation placed by Marcal and Mutual upon the legal effect of the February 27, 1952 amendments to the policy of insurance was correct or incorrect is now of no importance. They entered into a bona fide settlement of an existing dispute following negotiations at arm's length, both with full knowledge of material facts, and both were satisfied with the results thereof. The lower Courts possessed neither the right nor authority to ignore the terms of the settlement and rewrite them by virtue of placing a different interpretation upon the legal effect of the amendments.

(2)

The Lower Courts Decided an Important Question of Federal Law in Conflict with Principles Enunciated by this Court and by Lower Courts, Including the Tax Court.

Four months after the Tax Court decided the instant case, it rendered its decision in *Claude B. Kendall, et ux,* reported in 31 T. C. 549. There were no dissents and the case was reviewed by the Court.

In the *Kendall* case, taxpayers owned and operated a restaurant. Condemnation of the property was threatened by the State Highway Commission of Indiana. Negotiations were carried on by representatives of both parties the taxpayers demanding $120,000, the Commission offering $80,000. The $120,000 figure included a claim of $24,000 loss of operations due to time required to move to a new location, and $20,000 from the change of said location. The claim was ultimately settled for $98,000. The respondent contended that said settlement figure was made up of $74,000 for physical assets and $24,000 as payment for loss of business.

The Tax Court, in its Opinion, analyzed the pertinent facts relating to the $98,000 figure as follows:

> "The fact is that by the time the negotiations were concluded, actual experience had shown that there would be no basis for claiming such items. *There had been no loss of business or profits and ultimately the restaurant was closed only three days in making the move to the new quarters.* Again, if the parties had discussed the separate items, it is only reasonable to conclude that the $98,000 figure would have been arrived at, not by including a factor for loss of business and loss of profit, but by deleting from the $137,000 total in the appraiser's report the sum of $24,000 for loss of operation during the estimated six months required to move to a new location,

and the item of $20,000 because of loss of business from the change of location. To the $93,000 thus arrived at it would have been necessary to add only $5,000 to reach the total ultimately agreed upon." (Italics ours)

In reaching its decision adversely to the respondent's insistence for an allocation, the Tax Court observed that:

"This Court has held in similar situations involving involuntary conversions under threat of condemnation that a lump-sum purchase price is not to be rationalized after the event as a combination of factors which might properly have been separately stated in the contract if the parties had seen fit to do so. Marshall C. Allaben, 35 B. T. A. 327 (1937); O. N. Bymaster, 20 T. C. 649 (1953); Lapham v. United States, 178 Fed. (2d) 994 (C. A. 2, 1950).

And, in conclusion, the Tax Court observed that:

"The above cited cases all involve attempts by taxpayers to apportion lump-sum amounts. However, the rule should apply with equal force to respondent's present attempt to label a part of the $98,000 received by petitioners as consideration for anticipated loss of profits. We accordingly find no basis in fact or in law for concluding that any part of the amount received by petitioners was other than consideration paid for the property taken. *Cf.* Estate of Jacob Resler, 17 T. C. 1085 (1952) (Dec. 18,701)."

Reviewed by the Court.

(Acq. C. B. 1959—13, 7.)

The Court of Appeals for the Second Circuit in the *Lapham* case, *supra*, affirmed a District Court opinion (49-2 USTC Par. 9340) sustaining the Commissioner's determination, and stated (p. 996):

"In short, there was here a purchase and sale of a designated parcel of land at a designated price and that price when received was for income tax purposes the amount realized for the property sold. It has heretofore been held after the value of the property sold has thus been established, it is too late for the seller to reduce it for tax purposes by dividing it into parts labeled value and damages respectively. See Marshall C. Allaben v. Commissioner of Internal Revenue, 35 B. T. A. 327."

Citing:

William B. Greene, et ux v. *United States*, 173 Fed. Supp. 868.

In *Weiss* v. *Stearn*, 265 U. S. 242, 254 (1929), this Court emphasized the point that

"question of taxation must be determined by viewing *what was actually* done"

In *Max Thomas Davis*, 46 BTA 663, 671, it is stated that:

"A compromise is a contract. Although compromises are favored in the law, nevertheless a compromise contract is a proper subject for judicial consideration as to its meaning, validity or consideration, in the light of the language used *and in the light of the circumstances surrounding the making of it.* *Big Diamond Mills Co.* v. *United States*, 51 Fed. (2d) 721; *Colorado Milling & Elevator Co.* v. *Howbert*, 57 Fed. (2d) 769. As was said in *Insurance Co.* v. *Dutcher*, 95 U. S. 269, 'The practical interpretation of an agreement by a party to it is always a consideration of great weight. . . . *There is no surer way to find out what the parties meant, than to see what they have done*'." (Italics ours.)

B.

General Importance of the Question Involved.

(1)

The decisions below are in direct conflict with long-established principles enunciated by this Court, with prior and subsequent decisions of the Tax Court, and with decisions of other Courts of Appeals. Unless reviewed and reversed they will constitute precedents permitting courts to completely nullify or rewrite valid, fully executed contracts by the simple expedient of substituting said courts' reasoning and conclusions for those of the participants.

(2)

The decisions below are of primary, general importance. The question of allocating awards, particularly those made and received in cases of involuntary conversion, is one already affecting a large number of taxpayers. With the constant and rapid increase in condemnation proceedings, attendant upon construction of buildings and public highways, and with the vast number of fire loss and property damage cases arising and settled each year, taxpayers are entitled to be advised and instructed by this Court as to their rights to settle controversies arising among them upon such terms as they may legally agree, without danger of having their agreements nullified by courts solely because the latter "have reached conclusions opposite to those of the parties".

(3)

The lower courts have here rendered decisions that do violence to accepted legal principles, equity and justice.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD W. WILSON,
Counsel for Petitioner.

November, 1959.

Appendix A.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,884

MARCAL PULP & PAPER, INC., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

APPEAL FROM THE TAX COURT OF THE UNITED STATES

Argued June 12, 1959

Before BIGGS, *Chief Judge*, and MCLAUGHLIN and STALEY, *Circuit Judges*.

Opinion of the Court.

(Filed August 11, 1959)

PER CURIAM.

We can perceive no error in the reasoning or the decision of the Tax Court. Accordingly that decision will be affirmed on the thoughtful opinion of Judge Forrester, 30 T. C. 1345.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,884

MARCAL PULP & PAPER, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES.

Present: BIGGS, *Chief Judge*, and McLAUGHLIN and STALEY, *Circuit Judges.*

Judgment.

This cause came on to be heard on the record from the Tax Court the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby affirmed.

Attest:

HARRIET G. HUMPHRYS,
Chief Deputy Clerk.

August 11, 1959

Appendix B-1.

Internal Revenue Code of 1939.

SEC. 112. RECOGNITION OF GAIN OR LOSS.

* * * * * * *

(f) Involuntary Conversion.—If property (as a result of its destruction in whole or in part, theft, seizure, or requisition or condemnation or threat or imminence thereof) is compulsorily or involuntarily converted——

* * * * * * *

(3) Conversion into Money Where Disposition Occurred after 1950.—Into money or into property not similar or related in service or use to the converted property, and the disposition of the converted property (as defined in paragraph (2)) occurred after December 31, 1950, the gain (if any) shall be recognized except to the extent hereinafter provided in this paragraph:

(A) Nonrecognition of Gain.—If the taxpayer during the period specified in subparagraph (B), for the purpose of replacing property so converted, purchases other property similar or related in service or use to the property so converted, * * * at the election of the taxpayer the gain shall be recognized only to the extent that the amount realized upon such conversion (regardless of whether such amount is received in one or more taxable years) exceeds the cost of such other property * * *. Such election shall be made at such time and in such manner as the Secretary may by regulations prescribe. For the purposes of this paragraph——

(i) no property * * * acquired before the disposition of the converted property shall be considered to have been acquired for the purpose of replacing such converted property unless held by the taxpayer on the date of such disposition; and

(ii) the taxpayer shall be considered to have purchased property * * * only if, but for the provisions of section 113(a)(9), the unadjusted basis of such property * * * would be its cost within the meaning of section 113(a).

(B) Period within Which Property Must Be Replaced.—The period referred to in subparagraph (A) shall be the period beginning with the date of the disposition of the converted property, or the earliest date of the threat or imminence of requisition or condemnation of the converted property, whichever is the earlier, and ending——

(i) one year after the close of the first taxable year in which any part of the gain upon the conversion is realized, or

(ii) subject to such terms and conditions as may be specified by the Secretary, at the close of such later date as the Secretary may designate upon application by the taxpayer. Such application shall be made at such time and in such manner as the Secretary may by regulations prescribe.

* * * * * *

SEC. 117. CAPITAL GAINS AND LOSSES.

(j) Gains and Losses from Involuntary Conversion and from the Sale or Exchange of Certain Property Used in the Trade or Business.——

* * * * * *

(2) General Rule.—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of

property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. For the purposes of this paragraph:

(A) In determining under this paragraph whether gains exceed losses, the gains described therein shall be included only if and to the extent taken into account in computing gross income and the losses described therein shall be included only if and to the extent taken into account in computing net income, except that subsection (d) shall not apply.

(B) Losses upon the destruction, in whole or in part, theft or seizure, or requisition or condemnation of property used in the trade or business or capital assets held for more than 6 months shall be considered losses from a compulsory or involuntary conversion.